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Trying to Push a Square Peg through a Round Hole: Why the Higher Education Style of Strict Scrutiny Review Does Not Fit When Courts Consider K-12 Admissions Programs

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TRYING TO PUSH A SQUARE PEG THROUGH A ROUND HOLE: WHY THE HIGHER EDUCATION STYLE OF STRICT SCRUTINY REVIEW DOES NOT FIT WHEN COURTS CONSIDER K–12 ADMISSIONS PROGRAMS

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Our doubts are traitors, and makes us lose the good we oft might win, by fearing to attempt.[1]

I. INTRODUCTION

With affirmative action programs at institutions of higher education seemingly lying on their collective deathbeds,[2] the Supreme Court, long silent on the issue of race-based admissions programs at the university level,[3] issued its rulings on the highly publicized University of Michigan cases.[4] While representing a mixed bag, the rulings appear to breathe

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1. William Shakespeare, *Measure for Measure*, I.iv.78–80 (Brian Gibbons ed., Cambridge U. Press 1991).

2. A recent decision of the Eleventh Circuit Court of Appeals, striking down as unconstitutional the admissions program employed by the University of Georgia, was typical of circuit court decisions wherein race-based admissions programs were discussed, dismantled, and then discarded. *See e.g. Johnson v. Bd. of Regents of the U. of Ga.*, 263 F.3d 1234, 1254 (11th Cir. 2001) (holding that the undergraduate admissions program at the University of Georgia that considered race was unconstitutional).

3. The last case wherein the Supreme Court considered the use of race-based admissions programs at the collegiate level until the recent University of Michigan cases, *see infra n.* 4, was *Regents of the U. of Cal. v. Bakke*, 438 U.S. 265 (1978) [hereinafter *Bakke*].

4. *See Grutter v. Bollinger*, 123 S. Ct. 2325, 2339 (2003) (holding that the University of Michigan Law School's race-based admissions program was constitutional); *see also Gratz v. Bollinger*, 123 S. Ct. 2411, 2430 (2003) (holding that the University of Michigan's undergraduate admissions program violated the Equal Protection Clause). Commenting on the importance of the two University of Michigan cases against the *Bakke* backdrop, Ted Shaw, associate counsel of the NAACP, offered the following: "These represent the most significant civil right cases the Supreme Court will have decided in the last quarter century.... This issue is nothing less than whether the doors of opportunity remain open for students of color." William Mears, CNN.com Law Center,

some new life into a program that some saw as having reached the end of its line,[5] with the Court specifically holding that diversity can be a compelling governmental interest.[6] Thus, institutions of higher learning may consider the race of their applicants as the institutions seek to attract and enroll a racially diverse student body.[7]

The High Court's ruling will undoubtedly have wide-reaching effects on colleges and universities as they scramble to restructure evaluative processes that took years to create, assess, review, and revise. However, institutions of higher education are not the only places of learning that will be affected by the Supreme Court's decision. While a wide body of literature has addressed the use of race-based admissions programs in higher education,[8] little attention has been paid to another set of admissions programs that the Court's decision will also affect: race-based admissions programs in K–12 public schools. Such programs primarily exist in the context of "non-traditional" schools such as magnet schools, charter schools and school transfer programs,[9] wherein students typically compete for a limited number of seats.

Cases challenging race-based admissions programs in K–12 schools are intriguing for several reasons. First, the use of such programs in school districts is on the rise,[10] making relevant law increasingly pertinent

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Affirmative Action Case Awaits Supreme Court Review, <http://www.cnn.com/2002/LAW/12/02/scotus.affirmative.action/> (Oct. 31, 2003).

5. For example, on Nov. 9, 1999, before any court in Florida ruled on the constitutionality of the matter, Governor Jeb Bush officially ended affirmative action in Florida colleges and universities with his announcement of the "One Florida" initiative. The stated goal of this program is "increase[d] opportunity and diversity in the state's universities and in state contracting without using policies that discriminate or that pit one racial group against another." State of Florida, *One Florida Initiative* <http://www.oneflorida.org> (accessed Oct. 23, 2003). The plan seeks to accomplish this goal "without race-based admissions practices." State of Florida, <http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/announcements.html>.

6. *Grutter*, 123 S. Ct. at 2329.

7. *Id.*

8. *See e.g.* Ross I. Booher, Student Author, *Constitutional Law—Fourteenth Amendment Equal Protection Clause—Racial Preferences in College and University Admissions*, 64 Tenn. L. Rev. 497 (1997); Jennifer C. Brooks, Student Author, *The Demise of Affirmative Action and the Effect on Higher Education Admissions: A Chilling Effect or Much Ado about Nothing?*, 48 Drake L. Rev. 567 (2000); Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 Geo. L.J. 981 (1999); Leland Ware, *Tales from the Crypt: Does Strict Scrutiny Sound the Death Knell for Affirmative Action in Higher Education?*, 23 J.C. & U.L. 43 (1996).

9. *See Wessmann v. Gittens*, 160 F.3d 790, 791 (1st Cir. 1998); *Brewer v. W. Irondequoit C. Sch. Dist.*, 212 F.3d 738, 741 (2d Cir. 2000); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 702 (4th Cir. 1999); *Hunter v. Regents of the U. of Cal.*, 190 F.3d 1061, 1062 (9th Cir. 1999).

10. *See e.g.* Catherine Gewertz, *Dayton Feels the Heat From Charter Schools*, 21 Educ. Week 1 (Apr. 24, 2002) (available at <http://www.edweek.org/ew/ew_printstory.cfm?slug=32dayton.h21> (accessed Oct. 23, 2003)) (documenting that the number of charter schools is on the rise, with nearly 2,400 schools enrolling 580,000 students nationwide). The U.S. Department of Education reports that the number of magnet schools has tripled in the last decade. *See* Mid-Atlantic Equity

and pervasive. Second, there is a division among the Circuits as to how courts should rule on race-based admissions programs in the K-12 setting. Some courts have applied strict scrutiny review when ruling on K-12 admissions programs in much the same manner that these courts review affirmative action programs in higher education. On the other hand, other courts distinguish between the K-12 and higher education programs and attempt to tailor their analysis accordingly. Third, an intriguing aspect not present in litigation over higher education admissions programs is that admissions standards that take race into account in the K-12 setting likely do so to further integration. This effort started some 30 years ago by order of the United States Supreme Court[11]—and is today meeting serious resistance across the country.[12] The end result is a tension between Supreme Court precedent and the Equal Protection Clause of the Fourteenth Amendment.

This article will first provide background cases that highlight how the consideration of race has been part of K-12 public school systems since the abolition of slavery. It will then outline four recent cases that deal with the consideration of race as part of admissions criteria in K-12 public schools. Finally, in light of these recent decisions and the history of this body of law, this article will conclude that courts should employ a relaxed form of scrutiny when reviewing K-12 admissions programs that consider race as part of its assessment of candidates. Indeed, courts should give broad deference to school districts and allow them to consider race as they seek to reduce de facto segregation and racial isolation, and further promote integration.

II. CONSIDERATION OF RACE HISTORICALLY

A. *The Reconstruction Era*

The "Reconstruction Era," which began soon after the abolition of slavery in the United States, heralded several legislative advances that secured the civil rights of African-Americans.[13] Chief among this legislation were the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution.[14] Of course, there was great debate

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Consortium, *MAEC, Magnet Schools* <http://www.maec.org/mag-schl.html> (accessed Oct. 23, 2003).

11. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), *aff'd*, 349 U.S. 294, 301 (1955) (holding that segregation in public school systems was unconstitutional).

12. *See* Glenn C. Loury, *Integration Has Had Its Day*, N.Y. Times Op-Ed (Apr. 23, 1997) (noting the courts' relaxing of earlier decrees mandating integration).

13. Juan F. Perea, Richard Delgado, Angela P. Harris & Stephanie M. Wildman, *Race and Races: Cases and Resources for a Diverse America* 131-32 (Jean Stefancic, ed., West 2000).

14. *Id.* at 132-33.

about the scope of the new laws, and many resisted any real degree of equality between the black and white races.[15] The clamor soon reached the Supreme Court of the United States, which set forth the "proper" application of these Reconstruction Amendments. Unfortunately for African-Americans and other racial minorities, however, proper application usually meant limited application of these Amendments, particularly in cases involving violations of the civil rights of African Americans.[16]

B. Plessy v. Ferguson

In *Plessy v. Ferguson*, the Supreme Court had occasion to hear arguments regarding the constitutionality of a statute that the legislature had passed in the state of Louisiana.[17] This statute provided the following:

> [A]ll railway companies carrying passengers in their coaches in this state, shall provide *equal but separate* accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.[18]

The facts that brought this case to trial involved Plessy, a man of mixed heritage, who was told to leave the white section of a train and move to the section designated for African Americans.[19] Plessy refused, was hauled off to jail, and was later convicted of violating this criminal statute.[20] He subsequently challenged the statute on constitutional

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15. *Id.* at 140–41.

16. *See e.g. Slaughter-House Cases*, 83 U.S. 36, 68–73, 80–81 (1872). The Supreme Court interpreted the Privileges and Immunities Clause of the Fourteenth Amendment so narrowly as to render it completely ineffective in the protection of the civil rights of the freedmen. *See* Perea et al. *supra* n. 13, at 133. For constitutional purposes, this clause has been nullified and lies dormant. *Id.* Interestingly, the legislative history from the Fourteenth Amendment indicates that it was meant to be a very broad protection of natural law rights. *See* Cong. Globe, 39th Cong., 1st Sess. 2542 (1866), wherein Rep. Bingham argued that the Amendment should "protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within the jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State." *Id.* It is obvious that the Amendment was meant to apply to a much broader category of cases than was decided by the Supreme Court in the *Slaughter-House Cases*. *See also* Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* ch. 4 (Duke U. Press 1999) (criticizing the Supreme Court for not giving a much broader meaning to the Civil War and the post-War amendments).

17. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), *overruled, Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

18. *Plessy*, 163 U.S. at 540 (emphasis added).

19. *Id.* at 541–42. Plessy was ordered to vacate his seat in the white section by the Conductor.

20. *Id.* Plessy was forcibly ejected from the train with the assistance of a police officer, and

grounds.[21] The Supreme Court of Louisiana eventually upheld the statute.[22] Plessy then appealed to the Supreme Court of the United States.[23]

What resulted was the ratification of the so-called "separate but equal" doctrine.[24] In its opinion, the Supreme Court stated that a proper review of the statute required an analysis of its reasonableness, determined by the traditions and customs of that area.[25] Thus, in essence, the Court upheld this legislation because it ratified the *status quo* of the time. The Court reasoned that while the Fourteenth Amendment gave equality of legal rights to African Americans, it did *not* guarantee them equality of social rights.[26] This holding laid the foundation for the system of "separate but equal" public schools that quickly became the accepted legal norm in the United States.[27]

The "separate but equal" doctrine provided additional support for school systems to continue the practice of racial segregation. For instance, the Court buttressed its argument for the "separate but equal" doctrine by citing to lower court cases that approved segregation in the schools. One of the cases relied on by the *Plessy* court involved segregation efforts in Boston public schools, which had been approved by the Supreme Court of Massachusetts.[28] In short, *Plessy* simply provided additional judicial support for school systems to continue this racially divisive practice.

C. *Brown v. Board of Education*

It was not until 58 years later that the Supreme Court struck down the "separate but equal" system of schools. In *Brown v. Board of Education*, African American minors challenged the judgment of the

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from there was imprisoned in the parish jail.

21. *Id.* at 542.

22. *Id.* at 540.

23. *Id.*

24. *Id.* at 552.

25. *Id.* at 550–51. The court went on to state that "[i]n determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." *Id.*

26. *Id.* at 551–52.

27. *See* Perea et al., *supra* n. 13, at 147. "The *Plessy* decision gave the Supreme Court's sanction to the separate-but-equal Jim Crow laws of the late nineteenth century and probably fueled a dramatic expansion in the use of these laws during the early decades of the twentieth." *Id. See also* C. Vann Woodward, *The Strange Career of Jim Crow* 54 (Oxford U. Press 1957).

28. *See Plessy*, 163 U.S. at 544–46. The case referred to was *Roberts v. City of Boston*, 59 Mass. 198, 206 (1849), wherein the Supreme Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance in the other schools.

United States District Courts for the Districts of Kansas, South Carolina, Virginia and Delaware.[29] Although the lower courts had held that segregation in public education had a detrimental effect upon African American children, it denied that the schools were substantially unequal with respect to buildings, transportation, and educational qualifications of teachers.[30] In so ruling, the lower courts relied on the "separate but equal doctrine" originally set forth by the Supreme Court in *Plessy*.[31]

The Supreme Court of the United States reversed the ruling of the lower court, overturned *Plessy's* "separate but equal" doctrine, and expressly held that segregation was a denial of equal protection under the Fourteenth Amendment.[32] In so holding, the Court also noted that equality did not just apply to legal equality, as was announced in *Plessy*.[33] Instead, the Court reasoned, the Fourteenth Amendment properly applied to civil and social equality as well.[34]

D. Brown's Progeny

Brown made its way back to the Supreme Court a year later, at which time the Court instructed the School Board to make a "prompt and reasonable start" towards compliance with its prior ruling.[35] It was clear that the Supreme Court intended integration. The Supreme Court clarified and expanded *Brown* when ruling on the *Swann* cases of 1971.[36]

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29. *Brown*, 347 U.S. at 486. Interestingly, *Brown* was not the first case to explicitly reject the reasoning of *Plessy*. *Mendez v. Westminister Sch. Dist. of Orange County*, 64 F. Supp. 544, 549 (S.D. Cal. 1946), involved a statute mandating the segregation of Mexican-American students from English-speaking pupils. In that case, the court reasoned that "a paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage." *Id.* An interesting footnote is that this case "led to the repeal of California's segregation statutes." *See* Perea et al., *supra* n. 13, at 674. California Governor Earl Warren "signed the legislation repealing the segregation statutes." *Id.* Mr. Warren later served as Chief Justice of the United States Supreme Court and wrote the majority opinion in *Brown v. Board of Education*.

30. *Brown*, 347 U.S. at 486.

31. *Id.* at 488.

32. *Id.* at 494–95. The court stated that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected." *Id.* The Court went on to conclude that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 495.

33. *Id.* at 492.

34. *See id.* For a very detailed account of the long struggle for civil rights that ultimately led up to *Brown*, *see* Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*, (Alfred A. Knopf, Inc. 1975).

35. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

36. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *N.C. St. Bd. of Educ. v. Swann*, 402 U.S. 43, 43 (1971).

In the first of these cases, the Court stated that school authorities have "broad power to formulate and implement educational policy,"[37] including prescribing a specific percentage of minority students to attend each school "in order to prepare students to live in a pluralistic society."[38] These statements provided powerful authority for permitting, or even requiring, school officials to consider race when assigning students to schools within their districts.

III. A SURVEY OF RECENT CASES HIGHLIGHTING THE PROBLEM

A. *Standard of Review*

Four relatively recent cases involve the use of race-based admissions standards in the K-12 public school setting.[39] In each case, K-12 admissions programs that considered race as a key criterion were challenged for violating the Equal Protection Clause of the Fourteenth Amendment.

A strict scrutiny standard, established in *Adarand Construction, Inc. v. Pena*, was applied in each of the four cases.[40] In *Adarand*, the Supreme Court held that all racial classifications instituted by governmental entities are subject to the strict scrutiny standard of review.[41] This standard requires that the government demonstrate a *compelling interest* for employing a race-based classification.[42] It also mandates that the program instituted by the government must be *narrowly tailored* to meet that interest.[43]

B. *Wessmann v. Gittens, 1st Circuit*

One of the recent cases dealing with admissions policies of K-12 public schools was *Wessmann v. Gittens*, decided by the First Circuit in late 1998. *Wessmann* was a case involving "examination schools"—magnet schools that filled half their seats through flexible racial/ethnic guidelines—which were operated by the City of Boston.[44] In its review,

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37. *Swann*, 402 U.S. at 16.

38. *Id.*

39. *See Wessmann*, 160 F.3d at 792-93; *Brewer*, 212 F.3d at 740; *Tuttle*, 195 F.3d at 700; *Hunter*, 190 F.3d at 1062.

40. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) [hereinafter *Adarand*].

41. *Id.*

42. *Id.* at 237 (emphasis added).

43. *Id.* at 227 (emphasis added).

44. "The City of Boston operates three renowned 'examination schools,' the most prestigious of which is Boston Latin School (BLS)." *Wessmann*, 160 F.3d at 791. In 1974, the City of Boston was found "to have violated the constitutional rights of African-American children by promoting and maintaining a dual public school system." *Id.* at 792. Although no specific evidence was produced to show discrimination, one of the classic symptoms of segregation was sufficient for the court: an exceptionally low number of African American students attended BLS. *Id.* The remedy offered by

the First Circuit concluded that the strict scrutiny standard applied. It began its analysis by subjecting the admissions program to the first prong of the strict scrutiny analysis: the compelling governmental interest test.[45] The court then acknowledged that there was a split among courts as to whether a compelling government interest must be remedial in nature.[46] If so, there exists a contention that the attainment of diversity, arguably a non-remedial goal, is not a proper governmental objective. After some discussion on the matter, however, the court reserved ruling definitively on the matter and cautiously proceeded under the assumption that diversity *could* be a compelling governmental interest.[47]

The court next turned to the question of whether the Boston program was narrowly tailored to meet the compelling governmental interest of racial diversity.[48] However, soon after announcing the narrowly tailored means test, the court digressed to a discussion about whether or not diversity was a valid compelling governmental interest.[49] In the end, the court never did reach the question of whether the program was narrowly tailored.[50]

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the court was to obligate BLS to ensure that at least 35% of each entering class be composed of African-American and Hispanic students. *Id.* By 1987, the examination schools were no longer under a federal court mandate to maintain the 35% set-aside. *Id.* The set-aside program continued until 1995 when a disappointed applicant challenged its constitutionality, resulting in a court-ordered injunction and the discontinuance of the program. *Id.* at 792–93. As part of an effort to avoid a big drop in the number of minority entrants, a new policy was implemented. *Id.* at 793. This policy filled half of the seats for each examination school based on academic performance, and filled the other half based on flexible racial/ethnic guidelines. *Id.* Sarah Wessmann was a student who was excluded from admission, and instituted a lawsuit challenging the constitutionality of the program. *Id.* The district court held the program to be constitutional and an appeal quickly followed. *Id.* at 794.

45. *See id.* at 794. While the Supreme Court had employed the strict scrutiny standard for some time, its majority opinion in *Adarand*, 515 U.S. at 224, very clearly stated that any racial classification imposed by the government would be subject to the strictest judicial scrutiny. *Id.*

46. *Wessmann*, 160 F.3d at 795. The First Circuit Court noted the opinion of the Fifth Circuit in *Hopwood v. St. of Tex.*, 78 F.3d 932 (5th Cir. 1996), *overruled, Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), but expressly declined to accept its reasoning; instead it decided to assume that *Bakke* was still good law and that racial diversity could be a compelling government interest based on the statement from Justice Powell in that case. *Wessmann*, 160 F.3d at 796. The *Bakke* case involved a race-based admissions policy at the University of California at Davis. *Bakke*, 438 U.S. at 265. In that case, Justice Powell wrote that diversity could be a compelling governmental interest in an educational setting. *Id.* at 311. The *Hopwood* case involved a race-based admissions program at the University of Texas wherein the court explicitly rejected *Bakke* as binding and stated that diversity could never be a compelling governmental interest because it was not remedial in nature. *Hopwood*, 78 F.3d at 948.

47. *Wessmann*, 160 F.3d at 796.

48. *Id.* at 796.

49. *See id.* at 796–800. The court concluded that "the School Committee's Policy does not meet the *Bakke* standard and, accordingly, that the concept of 'diversity' implemented by BLS does not justify a race-based classification." *Id.* at 800.

50. *Id.*

The *Wessmann* court's discussion of diversity as a compelling governmental interest is altogether confusing. While the court gave lip service to accepting diversity as a compelling governmental interest, it spent the next several pages of its opinion picking apart the school's program because it had diversity as its stated goal.[51] And, whereas the court stated that it would not rule on whether diversity could be a compelling governmental interest, it nevertheless proceeded to lay out arguments about why it is probably *not* a compelling governmental interest.[52] In the end, the court concluded that the school's program was unconstitutional.[53] The result caused very mixed signals. It was obvious the court was reluctant to embrace the diverse student body rationale as a correct principle of law.[54]

C. Tuttle v. Arlington County School Board, 4th Circuit

In January 1999, the Fourth Circuit decided *Tuttle v. Arlington County School Board.*[55] In *Tuttle*, the court analyzed the Arlington County School Board's weighted admissions policy that considered race in its review of candidate files.[56] The specific question before the court was whether an oversubscribed public school could use a weighted lottery in admissions proceedings to promote racial and ethnic diversity in its student body.[57] Previously, the Fourth Circuit had upheld the remedial policy of the Arlington County School Board to achieve a

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51. *Id.* at 800–05.

52. *Id.* at 796–800.

53. *Id.* at 800.

54. *See* Preston Green, *May Examination Schools Use Racial Preferences in Their Admissions Process?: Wessmann v. Gittens*, 135 Educ. L. Rep. 873, 889 (1999) (pointing out that educational institutions will have a difficult time meeting requirements established by the Supreme Court for showing that their admissions programs meet the compelling interest of eliminating the vestiges of past discrimination).

55. 195 F.3d at 702.

56. *Id.* at 700.

57. *Id.* As part of its normal operations, the School Board operated the Arlington Traditional School ("ATS"), whose stated goal was not the remedy of past discrimination, but rather to promote racial, ethnic, and socioeconomic diversity. *Id.* at 701. ATS was an alternative kindergarten whose claim was to teach students in a "traditional" format. *Id.* Admission was not based upon merit but rather solely upon availability. *Id.* Since demand always outweighed the number of available seats, a lottery system was introduced by which students would be selected. *Id.* "The probabilities associated with each applicant's lottery number were weighted so that applicants from under-represented [racial and ethnic] groups . . . had an increased probability of selection." *Id.* at 702. This program was challenged on constitutional grounds, with the allegation that it violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* The district court ruled that the program was unconstitutional and entered a permanent injunction against the School Board. *Id.* at 700. The case was then appealed to the Fourth Circuit Court of Appeals. *Id.*

unitary school district.[58] This time, the court would rule on whether classroom diversity was a legitimate policy.

Because the program utilized racial classification, the court employed the strict scrutiny standard in its evaluation of the program.[59] In its review of the compelling interest prong of the strict scrutiny test, the court noted a split of authority as to whether diversity serves a compelling governmental interest.[60] Ultimately, the Fourth Circuit went the same route as the First Circuit in *Wessmann*; it explicitly stated that "until the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity *may be* a compelling government interest."[61]

The court then moved to its analysis of whether the admissions program was narrowly tailored to meet the compelling government interest of racial diversity.[62] In a very poorly reasoned section of its opinion,[63] the Fourth Circuit concluded that the program was not narrowly tailored and struck the admissions program down as unconstitutional.[64]

As its rubric for analyzing the narrow tailoring issue, the Fourth Circuit employed five factors it had previously utilized in a vastly dissimilar case involving the promotion of non-minority police officers in North Carolina.[65] The five "narrow tailoring" factors considered included: (1) the efficacy of alternative race-neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group member in the relevant population or work force; (4) the flexibility of the policy; and (5) the burden of the policy on innocent third parties.[66] The court hurriedly went through each of the factors, summarily concluding that the program met none of them, and proceeded to strike down the admissions program as unconstitutional.[67]

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58. *Hart v. County Sch. Bd. of Arlington County, Va.*, 459 F.2d 981, 982 (4th Cir. 1972).

59. *Tuttle*, 195 F.3d at 703. "We review racial classifications under strict scrutiny." *Id.*

60. *Id.* at 704.

61. *Id.* at 705 (emphasis added).

62. *Id.*

63. A thorough discussion of the court's misapplication of its arbitrarily chosen factors in analyzing whether the program was narrowly tailored to meet the compelling governmental interest of diversity is discussed at length.

64. *Tuttle*, 195 F.3d at 705–07.

65. *Id.* at 706. The case from which the factors were borrowed was *Hayes v. N. St. L. Enforcement Officers Assn.*, 10 F.3d 207, 216 (4th Cir. 1993).

66. *See Tuttle*, 195 F.3d at 706.

67. *Id.* at 706–07. For a discussion on the impact *Tuttle* and similar decisions, *see* Gerard Toussaint Robinson, *Can the Spirit of Brown Survive in the Era of School Choice? A Legal and Policy Perspective*, 45 How. L.J. 281, 318–20 (Winter 2002) (stating that these judicial decisions were deliberate legal attacks on Brown's call for racially integrated public schools).

D. Hunter v. Regents of the University of California, 9th Circuit

The Ninth Circuit also heard a case involving the consideration of race in a K-12 public school setting.[68] This case involved an elementary school used as a research laboratory by UCLA's Graduate School of Education and Information Studies.[69] As was the case with its sister circuits, the Ninth Circuit conducted an analysis of the University Elementary School (UES) program using the strict scrutiny review standard.[70] As if to avoid the question of whether diversity was a compelling interest, the court concluded that the Regents' "interest in operating a research-oriented elementary school [was] compelling."[71] To preemptively quash any backlash against this conclusion, the majority listed some noteworthy caveats.[72] First, the court noted that it was not UES's designation as a laboratory school that justified its admission process.[73] Second, UES's stated mission of educational research likewise did not justify its admissions process.[74] Finally, although research was central to the UES's charter, the court did not believe its ruling would "lead to racial classification in 'every stratum of a state's public education system'."[75]

The court next turned to the second prong of the strict scrutiny standard and questioned whether the admissions program was narrowly tailored to serve the purpose of California's compelling governmental interest.[76] In finding that the program was narrowly tailored, the court pointed to the reasoning of the lower court as persuasive: "[i]t would not be possible, nor would it be reasonable, to require the defendants to

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68. *Hunter*, 190 F.3d at 1062.

69. *Id.* The University Elementary School (UES) had the stated research and training mission to help the State of California meet the needs of students in multicultural urban schools. *Id.* To this end, UES considered gender, race/ethnicity, and family income in its admissions process to obtain the desired student population. *Id.* One of the students who was not selected for admission brought suit, through her parents, against the Regents of the University of California under Title VI of the Civil Rights Act of 1964. *Id.* at 1063. The suit challenged the constitutionality of the admissions program. *Id.* The district court concluded that the admissions program met the burden of strict scrutiny review, and ruled in favor of the Defendants. *Id.* The Plaintiffs filed a timely appeal to the Ninth Circuit. *Id.*

70. *Id.* at 1063.

71. *Id.* at 1064.

72. *Id.* at 1065.

73. *Id.* at 1066. *See also* Jason Walbourn, Student Author, *Strict in Theory, but Not Fatal in Fact: Hunter v. Regents of the University of California and the Case for Educational Research as a New Compelling State Interest*, 83 Minn. L. Rev. 183, 200–02 (1998) (noting that a state's interest in educational research compares favorably with other interests that have been asserted in support of racial classifications).

74. *See Hunter*, 190 F.3d at 1065.

75. *Id.*

76. *Id.*

attempt to obtain an ethnically diverse representative sample of students without the use of specific racial targets and classifications."[77] The court went on to hold that judges who review the substance of a genuine academic decision (in this case, the manner of research), should show great respect for the faculty's professional judgment.[78]

E. Brewer v. West Irondequoit Central School District, 2d Circuit

The Second Circuit Court of Appeals heard a case that involved a transfer program adopted by the West Irondequoit Central School District as part of a voluntary desegregation effort that started in 1965.[79] The court first addressed the issue of whether the reduction of racial isolation in participating schools was a compelling government interest.[80] The court pointed out that only the Fifth Circuit had ever ruled that the remedying of past wrongs by a governmental entity is the only compelling state interest to justify racial classifications,[81]and acknowledged that there was significant disagreement among the circuit courts as to whether the Fifth Circuit view was consistent with Supreme Court precedent[82]

However, the court rejected the Fifth Circuit's remedial argument for two reasons. First, the Fifth Circuit was the lone circuit to ever hold that a non-remedial state interest, such as diversity, may never justify race-based programs in the educational context.[83] Second, the Second Circuit itself had never barred diversity or other non-remedial interests from

77. *Id.* at 1066.

78. *Id.*

79. *Brewer,* 212 F.3d at 741. One of the stated goals of the program was to reduce minority group isolation. *Id.* "In other words, the program is designed to reduce the percentage of minority students in predominantly minority city schools, and to increase the percentage of minority students in predominantly white suburban schools." *Id.* at 742 (quoting *Brewer v. W. Irondequoit C. Sch. Dist.*, 32 F. Supp. 2d 619, 621 (W.D.N.Y. 1999)). As the program was then being administered, only minority pupils were allowed to transfer from predominantly minority city schools to participating suburban schools, and only non-minority students were permitted to transfer from suburban schools to city schools. *Id.* at 743. A white student, through his parents, brought suit against the school district when he was denied the opportunity to transfer from his predominately minority city school to a suburban school. *Id.* The district court found the program to be unconstitutional and entered a mandatory injunction against the School District. *Id.* An appeal to the Second Circuit quickly followed. *Id.*

80. *Id.* at 745.

81. *See id.* at 747. The Fifth Circuit case referred to is *Hopwood,* discussed *supra* at n. 46, wherein the Fifth Circuit expressly held that diversity could not be a compelling governmental interest since it was not remedial in nature.

82. *See Brewer,* 212 F.3d at 747. The court stated that "notwithstanding the Fifth Circuit's holding in this regard, there is much disagreement among the circuit courts as to whether this is, in fact, the state of the law under current Supreme Court jurisprudence." *Id.*

83. *Id.* at 747.

being compelling in the educational setting.[84] In fact, there was binding precedent in the Second Circuit that explicitly stated that reducing *de facto* segregation serves a compelling government interest.[85] To that end, the court concluded that a compelling government interest existed in programs that have as their objective the reduction of racial isolation stemming from *de facto* segregation.[86]

The court next conducted a review of whether the court below had abused its discretion in determining that the program was not narrowly tailored to meet the goal of true diversity.[87] The court quickly pointed out that since "true diversity" was not the stated goal of the program, the lower court would need to revisit its narrowly tailored analysis.[88] The court did note, however, that so long as reduction of racial isolation is a constitutionally permissible goal, there is no more effective means of achieving that goal than to base decisions on race.[89] The Second Circuit vacated the decision of the lower court and remanded the case to trial.[90]

IV. ANALYSIS AND PROPOSALS

A. *Fundamental Problems with Strict Scrutiny in K-12 Admissions*

To understand some of the inherent defects associated with the strict scrutiny standard, it is imperative to recall its birth. The Supreme Court first announced this standard in its review of the infamous Japanese internment that occurred during World War II.[91] In that case, under conditions that have since been determined to be so deplorable that the United States Government issued an apology and paid reparations to those whom the government had detained,[92] the Supreme Court held that

84. *Id.* at 752.

85. *Id.* The court stated that it was bound by prior precedent that "a compelling interest *can* be found in a program that has as its object the reduction of racial isolation and what appears to be *de facto* segregation." *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 752–53.

89. *Id.* at 753. *See also* Faiz Ahmad, Student Author, *Brewer v. West Irondequoit C. Sch. Dist.*, 7 Wash. & Lee Race & Ethnic Anc. L.J. 155 (Spring 2001) (concluding that when race coincides with a greater societal problem such as racial isolation, the consideration of race is appropriate).

90. *See Brewer*, 212 F.3d at 753.

91. *See Korematsu v. U.S*, 323 U.S. 214, 224 (1944) (stating that the Court was not prepared to say that the actions of the military were not justified).

92. *See* Perea et al., *supra* n. 13, at 411–12. The authors note that "due to the activism of advocates for the interned Japanese-American families, the survivors and descendants of persons interned during World War II ultimately received official letters of apology from the United States Government, signed by President George Bush, and payments of $20,000 per survivor in partial reparations." *See also* Yasuko I. Takezawa, *Breaking the Silence: Redress and Japanese American Ethnicity*, 51–59 (Cornell U. Press 1995).

the race-based classifications utilized in 1941 met the standard of strict scrutiny.[93] And while this demonstrates that there is indeed some flexibility in the standard (which means that courts can safely apply the standard and find a program to meet its requirements without fear of being the first court to so decide), this has not been the path chosen by the courts that have heard most cases involving the strict scrutiny analysis. Indeed, many of the courts appear to utilize the "'strict' in theory and, fatal in fact"[94] theme of strict scrutiny to strike down programs they find offensive, without providing solid reasoning to back up their decision.

As should be obvious from a review of the preceding K–12 public school cases, the courts must analyze two distinct areas when reviewing the issue of race-based admissions programs in K–12 public schools: (1) whether the program serves a compelling governmental interest; and (2) whether the program is narrowly tailored to meet that interest. These two areas are the prongs of the strict scrutiny standard announced by the Supreme Court in *Adarand* and followed by all courts that consider programs containing racial classifications and accompanying challenges under the Equal Protection Clause of the Fourteenth Amendment.

B. Is There a Compelling Governmental Interest?

Two principal arguments support consideration of race in K–12 public school admissions programs. The first argument is that racial diversity is a compelling governmental interest, and that those school districts that name diversity as the purpose of their various admissions programs therefore pass this prong of the test.[95] A second argument that supports consideration of race as a compelling governmental interest is that the government is trying to reduce *de facto* segregation and racial isolation in K–12 public school admissions programs that considers race.

1. The Diversity Argument

One of the interesting aspects of the diversity argument is that none of the circuit courts, except one, has ever explicitly rejected it.[96] In

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93. *Korematsu*, 323 U.S. at 223.

94. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

95. *See* Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 Fla. L. Rev. 861, 880–84 (2000) (arguing that admissions programs aimed at promoting racial and ethnic diversity in a student body are justified because they serve an internal educational good by promoting value diversity).

96. *See Hopwood*, 78 F.3d 932. For a discussion detailing potential problems with this decision, *See e.g.* Philip T.K. Daniel & Kyle Edward Timken, *The Rumors of My Death Have Been*

addition, none of the cases described above, when dealing with race-based admissions in K-12 schools, specifically rejected diversity as a compelling governmental interest.[97] However, those cases that found the K-12 admissions plans unconstitutional did so because the courts were thoroughly convinced that the programs were not narrowly tailored.[98] Because they viewed the programs at issue as not satisfying the "narrowly tailored" prong of the analysis, these courts likely felt that they could dodge the issue of whether diversity serves a compelling governmental interest. Therefore, it is probably not enough to argue that because these cases have not ruled against the question in the K-12 context, the issue is resolved.[99]

The most obvious support for the notion that diversity is a compelling governmental interest is the express holding of the Supreme Court in *Grutter v. Bollinger*.[100] Among other things, this opinion attempted to clear away any confusion arising from the Court's splintered decision in *U.S. v. Bakke* from 25 years earlier regarding whether diversity is a compelling governmental interest in the educational context.[101] Writing for the majority in *Grutter*, Justice

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Exaggerated: Hopwood's Error In "Discarding" Bakke, 28 J.L. & Educ. 391, 417 (1999) (concluding that the Fifth Circuit overstepped its authority by rejecting Justice Powell's opinion in *Bakke* as the law of the land); Emily V. Pastorius, Student Author, *The Erosion of Affirmative Action: The Fifth Circuit Contradicts the Supreme Court on the Issue of Diversity*, 27 Golden Gate U. L. Rev. 459, 496 (1997) (calling the Fifth Circuit decision a dramatic and unnecessary leap). Moreover, the recent decision of the Supreme Court in *Grutter* limits the utility of this decision, and likely serves to overrule its finding. 123 S. Ct. at 2337 ("we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions").

97. *See Wessmann*, 160 F.3d at 796; *Brewer*, 212 F.3d at 752; *Tuttle*, 195 F.3d at 705; *Hunter*, 190 F.3d at 1065.

98. *See Wessmann*, 160 F.3d at 800; *Tuttle*, 195 F.3d at 705-08.

99. *See* Victor G. Rosenblum, *Surveying the Current Legal Landscape for Affirmative Action in Admissions*, 27 J.C. & U.L. 709, 719-20 (Winter 2001) (noting the position taken by many courts that the issue of whether diversity serves a compelling governmental interest is open).

100. *Grutter*, 123 S. Ct. at 2325.

101. Justice Powell wrote that the "attainment of a diverse student body . . . clearly is a constitutionally permissible goal." *Bakke*, 438 U.S. at 311-12. That case had no majority decision, with four justices voting to allow the use of racial preferences, and four other justices voting to strike down the quota system that the University of California was then employing. *Id.* at 271-72. However, it was Justice Powell's opinion, which in essence formed a majority on each of these issues, which was the conclusive and deciding factor. *Id.* at 272. *See also* Martin D. Carcieri, *The Wages of Taking Bakke Seriously: Federal Judicial Oversight of the Public University Admissions Process*, BYU Educ. & L.J. 161, 163-64 (2001) (arguing that courts have not been vigilant in applying Justice Powell's opinion regarding diversity in higher education). Because Justice Powell wrote alone, critics of the diversity argument long argued that his statement was not the opinion of the Court, and therefore was not binding upon later courts that visit the issue. *See e.g. Hopwood*, 78 F.3d at 948; Terry Carter, *On A Roll(back): After Its Big Win in The Hopwood Case, Setting Aside Affirmative Action at the University of Texas Law School, The Center For Individual Rights Is On A Mission—To Do More of the Same at Other Public Universities*, 84 ABA J. 54 (Feb. 1998).

O'Connor stated that not only did the law school at issue have a compelling interest in attaining a diverse student body,[102] but that, more generally, "student body diversity is a compelling state interest that can justify the use of race in university admissions."[103]

Grutter also provides a potent antidote to the traditional argument against diversity serving a compelling governmental interest, which states that only remedial interests qualify as compelling governmental interests.[104] Critics of race-based admissions programs have, to this point, relied primarily on Justice O'Conner's statement in *Richmond v. J.A. Croson* [hereinafter *Croson*] that consideration of race in a non-remedial setting could lead to racial hostility.[105] However, there are several reasons why O'Conner's assertion has no binding precedential value. As a threshold matter, Justice O'Connor's statement about remedial interests was contained in a section of the case that only constituted a plurality of the Court[106]—it was purely dicta. Second, the court did not hold that only remedial interests could be compelling.[107] Further, two subsequent cases, decided by the Seventh and the Ninth Circuit respectively, affirm that O'Conner's statement was not binding precedent. In each case, the court allowed for racial classifications in a non-remedial setting.[108] Finally, Justice O'Connor herself wrote in *Waters v. Churchill*, a post-*Croson* majority opinion, that the Supreme Court had "never set forth a general test to determine what constitutes a compelling state interest."[109] And, to make certain that she was not misunderstood, O'Conner curtly added in *Grutter* that "we [The Supreme Court] have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination."[110]

In short, there is now clear, unequivocal precedent for the proposition that diversity constitutes a compelling governmental interest.[111] However, there are natural limitations that accompany this

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102. *Grutter*, 123 S. Ct. at 2338–39.

103. *Id.* at 2337.

104. *See Hopwood*, 78 F.3d at 945–46; *Lutheran Church-Missouri Synod. v. F.C.C.*, 141 F.3d 344, 354 (D.C. Cir. 1998) (stating that diversity cannot be elevated to compelling level).

105. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

106. *Id.*

107. *Id.*

108. *See Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996); *Smith v. U. of Wash. Law Sch.*, 233 F.3d 1188, 1199 (9th Cir. 2000). In *Wittmer*, the 7th Circuit specifically noted that the language from *Croson* regarding remedial interests was purely dicta. *Wittmer*, 87 F.3d at 919. It went on to hold that the use of racial classifications in promoting directors in boot camps for young criminals was a compelling governmental interest. *Id.* at 921.

109. 551 U.S. 661, 671 (1994).

110. *Grutter*, 123 S. Ct. at 2339.

111. *Id.* at 2337.

holding. First, this ruling relates to higher education, and courts opposed to using race as an admissions criterion may find this distinction persuasive when considering a race-based admissions program in the K-12 context. Second, *Grutter* itself imposed severe restrictions on the narrowly tailored aspect of strict scrutiny review, such that even where race may be considered, numerous limiting factors exist.[112] Third, although *Bakke* appeared to provide fertile ground for the idea that diversity was a compelling state interest, even the courts that assumed so for the sake of argument routinely struck down programs based on their supposed failure to satisfy the narrowly tailored prong.[113] Thus, even with Supreme Court approval of diversity as a compelling government interest, there is little reason to believe that courts will significantly alter their approach in race-based admissions cases. Indeed, *Grutter* may prove to be of limited utility in an era where most courts appear antagonistic to any school program that seeks to achieve diversity.

2. *Reduction of De Facto Segregation*

The reduction of *de facto* segregation and racial isolation in K-12 public schools is a second reason for these schools to consider the race of its applicants in their admissions programs.[114] One of the principal benefits of this argument is that it stays altogether away from the endless debate about whether diversity alone is a compelling governmental interest, that has gone on among judiciaries ever since *Bakke*.[115] An equally strong feature of this argument is that *Brown* and its progeny support it.[116] The Supreme Court plainly held in *Brown* that integration, indeed the elimination of the practice of segregation, was the goal that school districts should seek.[117] From this Supreme Court ruling which

112. *See id.* at 2343-43, 2345-46 (Some limitations the Court enumerated were prohibiting the use of quota systems, requiring that race cannot be a determining factor, requiring that any preference not unduly harm or burden members of any racial group, and that any plan to prefer a race must be limited in time.).

113. *See Wessmann*, 160 F.3d at 791; *Tuttle*, 195 F.3d at 702.

114. *See Brewer*, 212 F.3d at 753 (concluding that the reduction of racial isolation stemming from *de facto* segregation was a compelling governmental interest).

115. *See, e.g.*, Steven M. Kirkelie, *Higher Education Admissions and Diversity: The Continuing Vitality of Bakke v. Regents of the University of California and an Attempt to Reconcile Powell's and Brennan's Opinions*, 38 Willamette L. Rev. 615, 635 (2002) (noting that cases dealing with the concept of diversity in higher education have been fragmented and have placed a cloud of suspicion over the continuing vitality of *Bakke* as controlling precedent).

116. *See N.C. St. Bd. of Educ.*, 402 U.S. at 46; *Swann*, 402 U.S. at 16; *Brown*, 349 U.S. at 301; *Brown*, 347 U.S. at 495.

117. *See Brown*, 347 U.S. at 495-96. While the *Brown* decision dealt with *de jure* segregation, courts have found the *Brown* decision to extend to cases of *de facto* segregation as well. *See e.g. Crawford v. Bd. of Educ. of the City of L.A.*, 551 P.2d 28, 30 (Cal. 1976), *superseded, Crawford v.*

disbanded the dual system of schools, comes the logical conclusion that reducing segregation is a compelling governmental interest.

It may, therefore, be advisable for those who wish to defend race-based admissions practices in K–12 public schools to couch their programs in terms of an "elimination of *de facto* segregation" rationale. This rationale was approved by the Supreme Court in *Swann*,[118] and by the Second Circuit in *Brewer*.[119] It is likely that courts would accept this rationale in cases involving transfer programs, magnet and research schools since they fall under the K–12 public school umbrella wherein the precedents of *Brown* and *Swann* are binding.

The premise of this approach—that *de facto* segregation is a growing problem in elementary and secondary schools in the United States—is supported by recent scholarly research.[120] For example, in July 2001, the Civil Rights Project at Harvard University released a study showing that segregation continued to intensify throughout the 1990s.[121] Indeed, researchers determined that much of the progress for minority students in K-12 public school equality was eliminated in the 1990's—a decade that included three Supreme Court decisions that drastically limited desegregation remedies.[122] These statistics regarding the resegregation of schools, together with an understanding of many courts' approach to diversity as a goal of the government in educational settings, serve to create a clear path that school district personnel should take when

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Huntington Beach Union High Sch. Dist., 98 Cal. App. 4th 1275, 1285 (2002) (stating that school boards in California "bear a constitutional obligation to undertake reasonably feasible steps to alleviate such racial segregation in the public schools, regardless of the cause of such segregation").

118. In *Grutter*'s majority opinion, Justice O'Connor cited to numerous *amici* briefs that pointed to the educational benefits that flow from being exposed to persons of different backgrounds. 123 S. Ct. at 2339–40. She also made mention of the *amici* briefs filed by major American businesses that made clear that the skills needed in today's global marketplace can only be developed by exposure to widely diverse people, cultures, ideas, and viewpoints. *Id.* at 2340. Such practical benefits from the reduction of racial isolation provides further support for the use of race-based admissions programs in K–12 schools, whose primary mission is to prepare students for "work and citizenship." *Id.*

119. *See Brewer*, 212 F.3d at 747–52.

120. *See* Gary Orfield & Nora Gordon, *The Civil Rights Project at Harvard University, Schools More Separate: Consequences of a Decade of Resegregation*, <http:www.civilrightsproject.harvard.edu/research/deseg/separate_schools01.php> (July 17, 2001).

121. *Id.*

122. According to the study, 70.2% of the nation's black students now attend predominantly minority schools (i.e., minority enrollment of over 50%), which is up significantly from the low point of 62.9% in 1980. *Id.* More than a third of the nation's black students attend schools with a minority enrollment of 90–100%. *Id.* The proportion of black students in such schools has been rising consistently since 1986, when it was at a low point of 32.5%. *Id.* White students remain the most segregated from other races in their schools. *Id.* Whites on average attend schools where more than 80% of the students are white and less than 20% of the students are from all of the other racial and ethnic groups combined. *Id.*

constructing an admissions program for their non-traditional public schools. At the outset, it is essential that school district personnel give the program the proper label. Indeed, courts seem most hostile to programs that simply label their purpose as "racial diversity"[123] and significantly more welcoming to programs that list "reduction of *de facto* segregation" as their purported goal.[124] Therefore, the best approach for school district administrators to take may be to name "reduction of racial isolation stemming from *de facto* segregation" as the purpose of an admissions program that considers the race of its applicants, and to build the actual structure of the program around that purpose. By choosing this route, practitioners stay away from the oft contested "diversity" debate. This route also draws strength from the Supreme Court's holdings in *Brown* and *Swann*, thereby lending additional credence to the idea that desegregation is a compelling governmental interest.[125]

C. *"Narrowly Tailored Means" Prong of the Strict Scrutiny Standard*

1. *The Limited Utility of Rigid Factors*

The current application of the narrowly tailored means standard of the strict scrutiny analysis, at least in the context of K-12 public school admissions programs, is in need of a serious overhaul. As is readily apparent from the *Tuttle* case above, the actual standards utilized in a given court's narrowly tailored analysis are often arbitrary and rigid—which are ironically two factors that courts find offensive in admissions programs that take race into account.[126] The factors utilized by the *Tuttle* court are similar in scope and substance to factors applied by other courts when applying the narrowly tailored means prong of the strict scrutiny standard; therefore, it is a worthwhile exercise to examine the factors in order to determine their efficacy and to ascertain their usefulness.[127]

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123. *See e.g. Wessmann*, 160 F.3d at 796–800; *Hopwood*, 78 F.3d at 948.

124. *Brewer*, 212 F.3d at 752.

125. *See Brown*, 347 U.S. at 495–96 (holding segregation to be a deprivation of equal protection under the Fourteenth Amendment); *Brown*, 349 U.S. at 300 (ordering the School District to make a "prompt and reasonable start" in compliance with the earlier *Brown* decision); *Swann*, 402 U.S. at 16 (stating that school authorities have broad power to formulate educational policy).

126. *Tuttle*, 195 F.3d at 705–07.

127. The purpose of this exercise is to determine the utility of "factors" in determining whether or not a program is narrowly tailored. The *Tuttle* case was chosen because it is one of the main cases examined in this article, and it is the case that relied most heavily upon a given set of factors. Most courts examining this second prong of strict scrutiny employ these or similar factors; therefore, much of the reasoning and analysis to follow will have broad application in cases similar to *Tuttle*. In other words, the flaws inherent in the *Tuttle* court's analysis will most likely be present, in a very general manner at least, in other courts' analysis of comparable factors.

The court in *Tuttle* borrowed and misapplied analytical factors from a 1987 plurality decision of the Supreme Court that dealt with the denial of promotions to African-American applicants working in the State of Alabama.[128] The most flagrant misapplication by the *Tuttle* court came with its analysis of the first factor: the efficacy of alternative race-neutral policies. The court stated that it was obvious that there were viable alternative race-neutral policies because the Study Committee that recommended the program had also proposed one or more race-neutral alternatives to promote racial diversity.[129]

However, the court's reasoning is flawed for at least two reasons. First, just because a program was *proposed* does not mean that it was a viable option. Second, the fact that the Committee ended up selecting the race-based program proves that its study of the situation resulted in a verdict that this was the best way to achieve the district's goals. However, this explanation was of no consequence to the Fourth Circuit, which seemed content to disregard this factor in one short, disinterested paragraph.[130]

The court's analysis of the third factor is equally perplexing. The court stated that although spots are not set aside for minority applicants, the same result is practically reached because of the odds being skewed.[131] The court then mistakenly reasoned that: "The Policy's two goals, to provide students with the educational benefits of diversity and to help the School Board better serve the diverse groups of students in its district, do not require racial balancing."[132] To wit: following the reasoning of the court, even if white applicants fill 68 of the 69 seats at the school, the goals of classroom diversity and service to students of diverse backgrounds is met. This conclusion does not square with common sense—how can the school district be expected to cater to the needs of diversity when it is not allowed to actually consider diversity in making classroom assignments?

The court's reasoning elsewhere in the case is similarly unpersuasive, but does not appear as egregious as that which has been listed above.[133] Nevertheless, the defects indicated above are sufficient to demonstrate that the Fourth Circuit chose a rigid and arbitrary method by which to evaluate the usefulness of a program that considers race.[134] Interestingly,

128. *U.S. v. Paradise*, 480 U.S. 149, 171 (1987).

129. *Tuttle*, 195 F.3d at 706.

130. *See id.*

131. *Id.* at 707.

132. *Id.*

133. *See id.* at 705–07.

134. *See id.* at 706 (The court itself noted that the factors would be difficult to assess.).

the Fourth Circuit dug its heels in deep on this issue, employing the same unsound reasoning it had used in *Tuttle* to strike down an analogous case in 1999.[135]

2. *A More Appropriate Application*

Comparable arguments for arbitrariness can be made against other cases as well, since it seems that each Circuit randomly plucks from its case law a set of factors that it deems helpful in striking down admissions programs.[136] However, simply pointing to the flaws of current narrow tailoring analysis does not solve the problem. Nevertheless, there is a solution, and its foundation is language employed by the Supreme Court in *Adarand.* In *Adarand,* the Court's majority explicitly stated that the strict scrutiny standard applies to all cases involving racial classifications.[137] The Supreme Court then provided critical insight into the purpose of the strict scrutiny standard:

> [T]he purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[138]

In other words, the Supreme Court wants proof that there is a sound, legitimate reason for the government to make a race-conscious decision—the Court wants assurance that governmental agencies are not using race as a pretext for discrimination. In the K-12 context, school district personnel can point to the many benefits of a diverse class of students as proof that there is no hidden agenda when it comes to considering the race of applicants to non-traditional schools.[139]

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135. *See Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130–35 (4th Cir. 1999) (holding that the school district's transfer plan, which considered the race of the applicants, did not pass constitutional muster).

136. *See e.g. Johnson v. Bd. of Regents of the U. of Ga.*, 263 F.3d 1234, 1252 (11th Cir. 2001) (latching on to the Supreme Court's obscure and unrelated "Paradise factors" in order to justify striking down an admissions program that took race into consideration).

137. 515 U.S. at 226.

138. *Id.* (quoting *Croson*, 488 U.S. at 493).

139. The Civil Rights Project at Harvard University commissioned a study into whether diversity in elementary and secondary schools was of any benefit to the students. *See* Michal Kurlaender & John Yun, *The Civil Rights Project at Harvard University, The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District,* <http:www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.php> (Jan. 29, 2002) ("Results from the survey suggest positive educational impacts of diversity for students in the district. Overall, a substantial majority of students report a strong level of comfort with members of other racial and ethnic groups." In addition, "students indicate that their school experiences have increased their

In a court's consideration of K–12 race-based admissions policies, a relaxing of the strict scrutiny standard is in order. This relaxation can come properly by the way that courts handle the question of whether a program is narrowly tailored. As is obvious from a review of the current cases on this issue, courts are sometimes quick to strike down a program because it does not satisfy some designated set of factors.[140] The courts, in effect, are trying to shove square pegs through round holes—a futile effort indeed. The real question, consistent with *Adarand*, should be whether the government has a legitimate reason for considering race or whether the program is simply a pretext for discrimination. The answer to this question, in the context of admissions programs in K–12 public schools that consider race, based on educational jurisprudence in the United States for the past 50 years, must be that the programs are legitimate.

Furthermore, the legitimate reason to consider race—altogether different from the arguments that raged wildly in the context of schools of higher education—is that the Supreme Court has ruled against segregation and has essentially advocated a plan of integration in the K–12 public schools of this country.[141] If courts accept desegregation as a compelling governmental interest, it becomes clear that a school district will best meet this goal when it takes into account the race of the students when making assignment and admissions decisions. It does not matter the nature of the school program, whether it be for magnet schools, research schools, charter schools, or a transfer plan; so long as officials are seeking to institute programs which have as their goal the reduction of racial isolation that comes from segregation, the official should be permitted to consider race as part of their decision-making process.[142]

As noted previously, the Supreme Court is most concerned about illegitimate discrimination tactics disguised as legitimate admissions programs.[143] This danger is not present when a local school board acts to remedy clearly identifiable and obvious racial isolation in particular school districts. In these instances, programs seek to implement the very

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level of understanding of diverse points of view, and enhanced their desire to interact with people of different backgrounds in the future.... [S]tudents report they have been strongly affected by their school experiences.").

140. *See Tuttle*, 195 F.3d at 705–07.

141. *Brown*, 349 U.S. at 300.

142. Similar reasoning was actually employed by the Supreme Court in *McDaniel v. Barresi*, 402 U.S. 39, 41–42 (1971). A case that involved a school board that assigned students based on their race. In that case, the Court held that this program did not violate the Equal Protection Clause of the Fourteenth Amendment and stated that if the board had considered something other than the race of the students it "would have severely hampered the board's ability to deal effectively with the task at hand." *Id.* at 41.

143. *Adarand*, 515 U.S. at 224.

concept that the Supreme Court itself set forth almost 50 years ago.[144] Therefore, courts should be less concerned with applying rigid factors and more concerned with determining whether a given program[145] is a good "fit"—and there is no better "fit" to achieve an integration of the races in the primary and secondary school level than a program that considers the race of the individual applicants. In addition, it is important to remember that the Supreme Court stated that school officials are to have broad power to formulate and implement educational policies.[146] Where school officials have put together programs that further desegregation, a long-standing and sound policy established by the Supreme Court, and which seek to reduce racial isolation in accordance with Supreme Court directive, the judiciary must grant deference to their judgment.

V. CONCLUSION

The use of race-based admissions in K-12 admissions programs is at a critical stage. The circuit courts are divided on the constitutionality of these programs, and lower courts are just now beginning to digest the implications of the Supreme Court's recent University of Michigan decisions. This will undoubtedly influence the continued use of race-based admissions at the K-12 level. The Supreme Court's judgment in that case, and its analysis and use of the strict scrutiny standard there, provide some guidance to courts at all levels as to the merits of race-based admissions standards in the educational context. However, until the Supreme Court considers a K-12 race-based admissions program, lower courts are left with the charge to correctly balance the higher education cases with *Brown* and its progeny, all the while permitting school officials to continue their task of desegregating America's public schools.

Lower courts will likely hear many cases regarding K-12 race-based admissions programs before the Supreme Court provides any clear directive on the matter. As such, judiciaries that grapple with this issue need to make a crucial determination as they review the various programs. These courts must determine at the outset of their analysis that the reduction of the racial isolation that results from *de facto* segregation is a worthy governmental goal. Based on the Supreme

144. *Brown*, 349 U.S. at 294.

145. This precise issue was described by the Supreme Court in *Adarand* and reiterated in *Grutter*: admissions programs "must be calibrated to fit" the distinct issues raised in the use of race in granting admissions in K-12 public schools. *Grutter*, 123 S. Ct. at 2341.

146. *Swann*, 402 U.S. at 16.

Court's directive concerning the end of racial segregation, and the recent research indicating that segregation is once again occurring within the public school system, there should be little doubt that the elimination of this practice is a compelling interest that the government has a legitimate right to address and remedy. Once a court concludes that the elimination of *de facto* segregation is a credible governmental goal, then the court must exercise great care in determining how school district personnel administer such a program. Moreover, careful consideration should necessarily result in upholding programs that are not illegitimate in their purpose; programs that seek to bring together those of different racial and ethnic backgrounds, in full compliance with the directive of the Supreme Court, should survive. If the courts do not permit these programs to survive, it will be only a short time before segregation makes an ugly, divisive, and permanent comeback in elementary and secondary schools.[147]

147. Perhaps we are already on our way back to segregation. Kevin Brown, *The Implications of the Equal Protection Clause for the Mandatory Integration of Public School Students*, 29 Conn. L. Rev. 999 (1997). Professor Brown provides the following disturbing facts:

On December 13, 1993, the Harvard Project on School Desegregation released the results of a study that shows that 66 percent of all Black students and 74.3 percent of all Hispanic students attended predominantly minority schools in 1991–92. For African-Americans, these figures represent the highest level of racial segregation since 1968. *See* William Celis, III, *Study Finds Rising Concentration of Black and Hispanic Students*, N.Y. Times A1 (Dec. 14, 1993). In 1986, only 63 percent of African-American students were attending predominately minority schools and in 1968, only 54 percent of Latino students were attending majority-minority schools. *Id.* at n. 5. Researchers at a recent conference in North Carolina gathered to address the issue of resegregation in public schools. *See* Alan Richard, *Researchers: School Segregation Rising in the South*, 22 Educ. Week 5 (Sept. 11, 2002) (available at <http://www.edweek.org/ew/ewstory.cfm?slug=02deseg.h22&keywords=Alan%20Richard> (accessed Oct. 27, 2003)).